APR 2010

STATE OF MICHIGAN
SUPREME COURT

Appeal from the Court of Appeals
Hon. Kurtis T. Wilder, P.J., Hon. Patrick M. Meter, Hon. Deborah A. Servitto

MOHAMMAD MAWRI,

Plaintiff/Appellant,

Supreme Court Case No. 139647
Court of Appeals Case No. 283893
WCCC Case No: 06-617502-NO

v.

CITY OF DEARBORN,

Defendant/Appellee.

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF THE JURISDICTION OF THE SUPREME COURT

Appellee does not contest the Court's jurisdiction to consider Appellant's appeal.

QUESTIONS PRESENTED

I. Did Plaintiff fail to provide legally sufficient notice of his claim?

Defendant-Appellee answers "yes."
Plaintiff-Appellant answers "no."
The trial court answers "no."
The Court of Appeals answers "yes."

II. Is Plaintiff's claim barred by the two-inch rule?

Defendant-Appellee answers "yes."
Plaintiff-Appellant answers "no."
The trial court did not answer.
The Court of Appeals did not answer.

III. Is Plaintiff's claim barred by the natural accumulation doctrine?

Defendant-Appellee answers "yes."
Plaintiff-Appellant answers "no."
The trial court did not answer.
The Court of Appeals did not answer.

STATEMENT OF FACTS

I. Introduction

Plaintiff Mohamed Mawri alleges that on March 2, 2006, at 9:30p.m., he tripped and fell on a public sidewalk in Dearborn, Michigan. He alleges that the incident occurred in front of Plaintiff's own house, located at 5034 Middlesex Street in Dearborn. Complaint ¶ 5. However, this location is incorrect; the record shows without any doubt that Plaintiff fell on a sidewalk in front of 5026 Middlesex, located directly next door to 5034 Middlesex. The fact that the accident occurred at 5026 Middlesex is confirmed in three ways. First, Plaintiff's admissions place the accident in front of 5026 Middlesex. Second, the police report affirms that "Mawri stated that he slipped and fell on the sidewalk in front of 5026 Middlesex." Third, police photographs taken on the night of the accident show that the accident took place at 5026 Middlesex. This evidence confirms that the accident occurred in front of 5026 Middlesex, and not in front of Plaintiff's home at 5034 Middlesex.

Plaintiff's pre-suit letter purporting to provide statutory notice states that the accident occurred "in the area of 5034 Middlesex" and was due to a "defective sidewalk." Both statements violate the statutory requirements. The address is wrong, and therefore, the letter fails to provide the exact location of the accident. The description of the defect is vague, circular, and fails to describe the exact nature of the defect. Either of these deficiencies constitutes a violation of the statute's requirements and is sufficient in-and-of itself to dismiss this case. For the reasons set forth below, the lack of precision in the notice is fatal to Plaintiff's claim.

a. The Accident

The alleged incident occurred in the evening of a cold winter night and there was some snow and ice present on the ground. Police and rescue units were called to Plaintiff's home. When they arrived,[1] Plaintiff reported that he slipped and fell "because the sidewalk was covered with ice." Plaintiff's appendix at p 11a. Photographs of the area taken by police on the scene confirm that slippery conditions existed on the sidewalk at the time of the alleged incident. Defendant's appendix at pp 25b-26b. At the hospital, Plaintiff reported his injury was caused due to falling on ice. Defendant's appendix at p 32-34b.

In the months prior to Plaintiff's accident, City Engineering staff performed routine evaluation of public sidewalks in the area. Staff were present on Middlesex on February 7, 2006, and the sidewalks were marked for replacement on April 18, 2006,[2] after Plaintiff's accident. Plaintiff's appendix at p 16a; Defendant's appendix at p 73b.

b. The Letter from Plaintiff's Counsel – Wrong Address and Vague Description

i. *Required Contents of the Notice*

Plaintiff was required to provide the City with a pre-suit notice of his claim "as a condition to recovery." MCL 691.1404 (1). The statute sets forth the requirements of the notice:

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[1] The police report confirms that police were dispatched to Plaintiff's home at 5034 Middlesex; that is the "location" noted on the police report. The narrative of the police report then explains that Plaintiff's accident occurred next door, at 5026 Middlesex. Plaintiff's appendix at p 11a. Plaintiff attempts to argue that the police report "location" of 5034 Middlesex means that the accident may have occurred there. A simple reading of the report disproves that theory – officers "responded to the above location [5034 Middlesex] for a slip and fall on a city sidewalk. Upon arrival, I spoke with Mawri [who] stated that he slipped and fell on the sidewalk in front of 5026 Middlesex because the sidewalk was covered with ice." Plaintiff's appendix at p 11a.

[2] Of course, concrete cannot be poured until Spring. Typically, this type of work resumes around April 15.

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. **The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.**

MCL 691.1401 (1) (emphasis added).

In *Rowland v Washtenaw County Road Commission,* 477 Mich 197 (2007), the Supreme Court ruled that

> ...the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered.* Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice.*

Rowland, at 219 (emphasis in original; footnote omitted). *Rowland* affirms the statute's plain requirement that Plaintiff's notice must include four components:

> (1) the **exact** location of the defect; (2) the **exact** nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time of the notice.

Rowland, Kelly, J. concurring, at 250 (emphasis added). If Plaintiff fails to provide pre-suit notice as required by the statute, then his claim must be dismissed:

> Plaintiff's failure to meet one of the four statutory requirements **cannot be excused**. Consequently, her claim **must be dismissed**.

Id (emphasis added; footnote omitted).

ii. Plaintiff's Notice was Defective

Plaintiff's accident occurred on March 2, 2006. His "cover letter" purporting to give notice of the incident was not provided to the City of Dearborn until May 26, 2006. Plaintiff's appendix at p 33a. The letter indicated that Plaintiff fell "in the area of 5034 Middlesex." It did not refer to the correct location -- 5026 Middlesex. Moreover, by the time that Plaintiff sent the letter, the sidewalk in dispute had already been repaired as part of the city's regular sidewalk inspection program.[3] The City marked the sidewalks at both 5026 Middlesex and 5034 Middlesex on April 18, 2006, and the City's contractor poured new concrete on May 24, 2006, two days before Plaintiff's letter. Plaintiff's appendix at p 16a; Defendant's appendix at p 73b. Consequently, by the time Plaintiff sent notice to the City of Dearborn, over two months after the incident, the condition of the disputed sidewalk had changed, and the City had no opportunity to investigate Plaintiff's claim. By the time the City received notice, sidewalk repairs had already been completed. [4]

Although Plaintiff's letter was mailed within 120 days, it was fatally defective in a number of other ways. First, it failed to provide the exact location of the accident – in fact, it gave the **wrong** location of the accident. Plaintiff's description of the location must be precise, and it was anything but – it gave the wrong location.

Next, the letter also failed to provide the exact nature of the defect – all it said was that Plaintiff fell on a "defective sidewalk." Such a description provides no detail or exactness about what was wrong with the sidewalk – whether it was raised,

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[3] The sidewalks at both 5034 Middlesex (the wrong address) and 5026 Middlesex (the correct address) were repaired at the same time. *See* Plaintiff's appendix at p 16a and Defendant's appendix at p 73b.
[4] Under former law, the City would have agreed that it was prejudiced because the repairs were made before the notice was sent. *Rowland* makes clear, however, that an analysis of prejudice is unnecessary.

cracked, worn, crumbling, missing, or contained holes. Because the notice failed to provide any exact information, as required by the statute, the case was properly dismissed by the Court of Appeals.

II. Trial Court Proceedings

Defendant filed its Motion for Summary Disposition on October 5, 2007. Oral argument was held in the Third Circuit Court before the Honorable Robert L. Ziolkowski on November 2, 2007. Defendant's appendix at pp 44b-51b. In the trial court brief, Defendant argued that Plaintiff's claim was barred due to: 1) legally insufficient notice, 2) the two-inch rule, and 3) the natural accumulation doctrine. At the hearing, Judge Ziolkowski only ruled on the notice argument and did not consider Defendant's other claims. Judge Ziolkowski based his ruling regarding notice chiefly on the fact that Defendant's police officers had been dispatched to the scene of Plaintiff's accident and had taken pictures:

> THE COURT: Let me ask you this, the mayor[5] was investigated by the police department, wasn't he?
>
> MR. IRVING: Yes.
>
> THE COURT: And they took pictures.
>
> MR. IRVING: Yes.
>
> THE COURT: That's your agent, isn't it?
>
> MR. IRVING: Yes.
>
> THE COURT: It's your police department?

[5] The transcript contains an error at this point. The transcript states that the Court asked "Let me ask you this, the mayor [sic] was investigated by the police department, wasn't he [sic]?" and counsel for the City responded "Yes." Counsel for the City believes that the Court asked whether this matter was investigated by the police department. This is an obvious typographical error because nothing in the record pertains to any action of the mayor. There was no discussion of the mayor at the hearing, nor would there have been any investigation of the mayor.

MR. IRVING: Yes. They took pictures, in their report they noted that it occurred at 5026 Middlesex.

THE COURT: All right.

MR. IRVING: Next door.

...

THE COURT: So you have a – so there's a doubt based on the incident report that the pictures that your people took as to what, where the accident occurred?

...

MR. IRVING: I do not. No. However, the plaintiff's duty is to provide us with that presuit notice.

THE COURT: Motion's denied.

...

MR. IRVING: And the court - - so the court's ruling is that the police department is sufficient notice to the city?

THE COURT: No. The notice is sufficient – the notice coupled with the information that you already had certainly is sufficient. My understanding is that the accident happened on the sidewalk in front of the guy between his house and the neighbor's house.

...

THE COURT: So what's he do, 56 and a half street or what? Put a big X on the street?

...

THE COURT: What more better notice can you have than your agent coming out and taking the pictures?

...

THE COURT: The whole concept of this is to give the city notice to defend and to prepare a defense to the case. Number one, they got a police report, they got a police officer that took pictures. They got pictures of the defect. They have acknowledged the defect because prior to the fall your people had notice of the defect, and went out and tagged the sidewalk.

MR IRVING: Plaintiff is still required to strictly comply with the statute, Your Honor, and they did not.

THE COURT: Well I think they did. Motion denied.

(Tr., p. 5-8. Defendant's appendix at pp 48b-51b.)

Judge Ziolkowski also apparently accepted as true Plaintiff's suggestion that the sidewalk involved in the accident was between the two addresses. This is despite Plaintiff's own assertion at his deposition that he fell in front of 5026 Middlesex – the home next door to the address listed in Plaintiff's purported "notice" to the city.

Judge Ziolkowski's conclusion is also in direct tension with affidavit testimony and maps of the accident scene produced by Defendant in support of its Motion for Reconsideration. After the City received Plaintiff's affidavit contradicting his deposition testimony, City Engineering staff used aerial photographs and physical measurements to confirm that the tree adjacent to the sidewalk where Plaintiff fell is located in front of the neighbor's house at 5026 Middlesex, fully 15 feet south of the property line between the two houses. Defendant's appendix at p 72b. It is a physical impossibility for the tree to be located "between" the two houses, as claimed by Plaintiff in the hastily-drafted affidavit that contradicted his deposition testimony. The accident site is located 15 feet away from the property line that separates the two properties. It simply cannot be located "between" the two addresses. Thus, the trial court's ruling that the accident site was located between the two houses was erroneous.

The trial court entered its Order Denying Defendant's Motion for Summary Disposition on November 2, 2007. Defendant filed its Motion for Reconsideration on November 8, 2007, arguing that the Court committed palpable error in ruling that the notice was sufficient despite the existence of on-point precedent to the contrary. Defendant attached the City Engineer's drawing of the site to the Motion for

Reconsideration. Defendant further requested that the Court consider the alternative arguments Defendant raised in its Motion. Judge Ziolkowski denied Defendant's Motion for Reconsideration by Order entered on February 5, 2008.

III. The Court of Appeals Reversed the Trial Court

In its Opinion dated August 6, 2009, the Court of Appeals reversed the trial court and ordered that this case be remanded for entry of an order granting Defendant's Motion for Summary Disposition. *Mawri v Dearborn,* unpublished opinion per curiam of the Court of Appeals, issued Aug. 6, 2009 (Docket No. 283893), p. 6.

The Court of Appeals ruled that the trial court erred when it held that Plaintiff's pre-suit notice was adequate under the notice statute, MCL 691.1404(1). Specifically, the Court of Appeals noted that the address given in the notice was insufficient, that the police report did not give notice to Defendant, and that the "nature of the defect" was not described as required by the statute. *Mawri,* at 5-6. It noted that merely referring to a "defective sidewalk," without more, is circular. *Id.,* at 6.

STANDARD OF REVIEW

The Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek,* at 337. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76 (1999). A motion for summary disposition based on the lack of a material factual dispute must be

supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line,* 242 Mich App 560, 574 (2000). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co,* 451 Mich 358, 362 (1996). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp,* 238 Mich App 361, 369-370 (2000).

Similarly, in reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations. *Abbott v John E Green Co.,* 233 Mich App 194, 198 (1998). The Court also considers documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. MCR 2.116(G)(5).

ARGUMENT

I. PLAINTIFF FAILED TO PROVIDE LEGALLY SUFFICIENT NOTICE OF HIS CLAIM.

A. Introduction

MCL 691.1404(1) provides:

> as a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The notice must be served personally or by registered mail on any person who may lawfully accept service for the governmental agency, MCL 691.1404(2).

B. Historical Notice Requirements

Michigan has had a highway defect notice provision in place for over 100 years. Section 3173 of the Compiled Laws of 1897 provided:

> The council shall have supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks and public grounds within the city, and shall cause the same to be kept in repair, and free from nuisance. No city subject to the provisions of this act shall be liable in damages sustained by any person in such city either to his person or property by reason of any defective street, sidewalk, crosswalk, or public highway, or by reason of any obstruction, ice, snow or other encumbrance upon such street, sidewalk, crosswalk or public highway, situated in such city unless such person shall serve, or cause to be served, within sixty days after such injury shall have occurred, a notice in writing upon the clerk or deputy clerk of such city, which notice shall set forth substantially the time when and place where such injury took place, the manner in which it occurred, and the extent of such injury as far as the same has become known, and that the person receiving such injury intends to hold such city liable for such damage as may have been sustained by him.
>
> C.L. 1897; Defendant's appendix at p 76b.

Thus, in the nineteenth century, an injured person could satisfy the notice requirement by serving a notice that "substantially" provided the time, location, and manner of the accident, and which stated the extent of the injuries sustained.

By the early twentieth century, however, the legislature eliminated the substantial compliance language of the statute and added a provision requiring that the injured person serve a notice "specifying" certain facts. Public Act 301 of 1915 provided:

> Sec. 8. In the event damages are sustained by any person, either by bodily injuries or to his property, because of the defective condition of any highway, street, bridge, sidewalk, crosswalk or culvert in any city or incorporated village of this State where written notice of such inquiry [sic, injury] and defect is now required by law to be served upon such village or city before recovery can be had,

> it will be necessary to show that such person did serve written notice upon said city or village within sixty days from the happening of such injury. Said notice may be served upon any member of the common council, city or village clerk, board of public works, street commissioner, marshal, or other city or village officer, except policeman or fireman. The notice will specify the location and nature of said defect, the injury sustained, and the names of the witnesses known at the time by the claimant. ...
>
> Defendant's appendix at pp 78b-79b.

The strict notice provision continued to be in effect three decades later, as shown in the Complied Laws of 1948:

> In the event damages are sustained by any person, either by bodily injuries or to his property, because of the defective condition of any highway, street, bridge, sidewalk, crosswalk or culvert in any city or incorporated village of this state where written notice of such inquiry[6] and defect is now required by law to be served upon such village or city before recovery can be had, it will be necessary to show that such person did serve written notice upon said city or village within 60 days from the time of the happening of such injury. Said notice may be served upon any member of the common council, city or village clerk, board of public works, street commissioner, marshal, or other city or village officer, except policeman or fireman. The notice will specify the location and nature of said defect, the injury sustained, and the names of the witnesses known at the time by the claimant. ...
>
> C.L. 1948; Defendant's appendix at p 80b.

Thus, a strict notice requirement has existed in the statutes of our state for ninety-five years. By the adoption of these statutes, the legislature has indicated its clear intent that notices must contain detailed information and must be timely served.

[6] The official report indicates that "it is evident the word 'inquiry' should be 'injury.'"

C. Current Law

The current version of the pre-suit notice requirement was first enacted in 1964. Like its predecessors, the current version requires exactness. The Supreme Court endorsed the statute's strict notice requirements in *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197 (2007), and affirmed that notice is a prerequisite for recovery. The Court specifically held,

> The statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e. it specifies the exact location and nature of the defect, the injury sustained, and the names of witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered.*

Rowland, at 219 (emphasis in original, footnote omitted.)

In an opinion concurring in part and dissenting in part, Justice Kelly, now Chief Justice Kelly, joined by Justice Weaver in large part, explained the requirements of the statute:

> To be sufficient under MCL 691.1404 (1), notice must include four components: (1) the **exact** location of the defect; (2) the **exact** nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time of the notice.

Rowland, Kelly, J. concurring, at 250 (emphasis added). Because Plaintiff's notice in *Rowland*

> contains no reference at all to the defect, it certainly does not rise to the level of an exact statement. MCL 691.1404(1) utilizes the mandatory word "shall" in setting for the four required components of notice. **Plaintiff's failure to meet one of the four statutory requirements cannot be excused**. Consequently, her claim must be dismissed.

Id. (emphasis added, footnote omitted).

Thus, in *Rowland,* the clear majority ruled that Plaintiff's claim must be dismissed because it was received outside the 120-day period, regardless of whether the governmental agency was prejudiced. *Rowland,* at 219. Significantly, the clear majority further held that notices received *within* 120 days of the accident must exactly specify the location and nature of the defect, the injury sustained, and the nature of the defect. *Id.* Chief Justice Kelly and Justice Weaver agreed that Plaintiff's claim must be dismissed and focused on the fact that the notice lacked specificity (". . . given that the notice was deficient, the date that plaintiff provided it is inconsequential. Even if Plaintiff had provided it within 120 days, under [the statute] defendant would have been entitled to summary disposition." *Rowland,* Kelly J. concurring, at p. 251-2.)

Six justices in *Rowland* agreed that a notice received within 120 days that is not exactly specific as to the location and nature of the defect is insufficient as a matter of law. This is exactly the situation in the instant case.

More recently, in *Raboczkay v City of Taylor,* unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 277772), *lv den,* 486 Mich 906 (2009), Plaintiff was injured in an automobile accident due to an allegedly defective highway. She argued that a city police officer's incident report written after the accident constituted adequate notice to the City of Taylor under MCL 691.1404. The Court of Appeals rejected this claim:

> "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Brown v Mayor of Detroit*, 478 Mich 589, 593; 734 NW2d 514 (2007). The phrase "shall serve notice" is mandatory, not permissive. "'A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate

legislative intent as evidenced by other statutory language or by reading the statute as a whole.'" *Oakland Co v Michigan*, 456 Mich 144, 154 n 10; 566 NW2d 616 (1997), quoting *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). Neither the plain meaning of the statute as a whole or in any part indicates that the word shall is not mandatory. Further, "[n]otice provisions permit a governmental agency to be apprised of possible litigation against it and to be able to investigate and gather evidence quickly in order to evaluate a claim." *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997).

Here, the incident report was prepared by a police officer. The relevant portion of MCL 691.1404 provides that it is the injured person who "shall serve a notice on the governmental agency of the occurrence of the injury and the defect" as a condition for recovery under the highway exception to governmental immunity. Further, no evidence was offered that the incident report was made with an eye toward future litigation. Thus, to find that the incident report satisfied the notice requirement would frustrate the purpose of this subsection.

Moreover, the incident report lacked the content needed to satisfy MCL 691.1404. "To be sufficient under MCL 691.1404(1), notice must include four components: (1) the exact location of the defect; (2) the exact nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time of the notice." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 250 (Kelly, J. concurring in part and dissenting in part); 731 NW2d 41 (2007). Regarding location, although the incident report indicated the location of plaintiff's vehicle upon Seifert's arrival, the report did not specify the location of the accident. Further, the report contained no references to any specific defect or the presence of witnesses. Therefore, the trial court's finding that the incident report satisfied the requirements of MCL 691.1404 was erroneous.

Nor did [Officer] Seifert's investigation of the accident scene, and resultant incident report, serve as constructive notice to defendant. "Notice to a police officer is ordinarily not notice to the municipality, except where he or she is charged with the duty of remedying or reporting defects." 19 McQuillan, Municipal Corporations (3d ed), § 54.174, pp 569-570. See *Corey v Ann Arbor*, 134 Mich 376, 378; 96 NW 477 (1903).

Id at 6-9 (emphasis added).

On March 18, 2009, the Supreme Court denied leave to appeal in *Roboczkay,* 486 Mich 906 (2009), leaving intact the Court of Appeals ruling that notice to a police officer is insufficient notice under *Rowland.*

Roboczkay makes clear that an incident report cannot form the basis of the notice required under MCL 691.1404. It was not served by the Plaintiff on the City, and does not contain any reference to the names of any witnesses, the injury sustained, or the exact nature of the defect. It does not meet the level of specificity required by MCL 691.1404.

In *Ells v Eaton Cty Rd Comm,* 480 Mich 902 (2007), Plaintiff alleged that Defendant road commission's placement of road barricades on a highway caused an accident. Following the accident, the road commission had an engineer and two other employees at the accident site on the same day as the accident, taking measurements and "extensive" photographs of the crash scene. The Court of Appeals used a pre-*Rowland* analysis to determine that because the road commission had employees at the accident scene on the afternoon of the incident, it had not shown actual prejudice.[7] The Supreme Court granted a peremptory reversal, finding that Plaintiff failed to provide the notice required by MCL 691.1404.[8] The case was dismissed, despite the road commission's actual knowledge of the accident on the date of the accident, the taking of measurements and extensive photographs on the date of the accident, and the presence of road commission employees at the accident scene on the day of the

[7] This seems to be the same logic employed by the trial court in the present case – "what more better notice can you have than your agent coming out and taking the pictures?" Tr, p 6.
[8] Plaintiff in *Ells* had failed to provide "proper" notice. COA slip op at 2, 3, dissent at 2. In the present case, Plaintiff likewise failed to provide proper pre-suit notice.

accident. Because Plaintiff did not provide the required pre-suit notice, the case was required to be dismissed.

The same result was reached in *Mauer v Topping,* unpublished opinion per curiam of the Court of Appeals, issued April 7, 2005 (Docket No. 250858), *rev'd in part,* 480 Mich 912 (2007), where the use of a police report as notice was not sufficient to establish notice under MCL 691.1404(1). In *Mauer,* the Court of Appeals found:

> Nothing in the statute indicates that this cannot be accomplished by the incorporation of a police report that adequately meets the requirements of the statute. Consequently, we hold that the police report enclosed with the letter of August 15, 2002 may properly be considered in determining whether the letter constituted proper notice under the statute.

Mauer, supra, slip op at 12.

The Supreme Court, however, in an order released on October 19, 2007, rejected this approach, finding that Plaintiff's notice was untimely and barred by *Rowland.* In an opinion concurring in part, Justice Weaver noted that the notice incorporating the police report would be deficient even if it had been received timely, because it failed to specify the exact location and nature of the defect. Thus, a general letter failing to include the statute's requirements cannot be found to comply with the statute even if a police report is included with the letter.

Plaintiff relies on a public building exception case, *Chambers v Wayne County Airport Authority,* unpublished opinion per curiam of the Court of Appeals, docket no. 277900 (released June 5, 2008), *lv den,* 483 Mich 1081 (2009), to support his claim that "close enough" notice is sufficient in a highway exception case. The present case, however, involves the highway exception to governmental immunity and not the public building exception of MCL 691.1406. *Chambers* is thus not controlling in this case.

The rationale for the notice requirement is to inform the City about the defect for which it will be held liable at trial, and thus afford the city the opportunity to investigate the claim. *Rottschafer v City of East Grand Rapids,* 342 Mich 43, 51 (1955). With proper notice, the City is able to conduct its investigation "while the evidentiary trail is still fresh." *Hussey v Muskegon Heights,* 36 Mich App 264, 267-268 (1971). Where a plaintiff's initial notice varies from her actual claim, "the initial step by plaintiff to fasten liability fail[s, and] all subsequent action based thereon lack[s] the necessary starting point." *Harrington v Battle Creek,* 288 Mich 152, 155 (1939). Even when a city ultimately repairs an allegedly defective sidewalk on its own, this fact is immaterial if the Plaintiff's description of the place of injury is not so detailed as to lead the reader of the notice directly to the alleged accident scene. *Dempsey v Detroit,* 4 Mich App 150, 152 (1966). Inadequately detailed notice is improper notice, without exception.

Additionally, where a plaintiff's initial notice states a theory of liability that differs from the one ultimately pursued in litigation, the initial notice is insufficient to satisfy the terms of the statute. *Rottshafer,* at 50-53. In *Rottshafer,* the plaintiff actually provided several notices to the City of East Grand Rapids, each of which indicated that she tripped over a break in the sidewalk, but she did not describe the defect with any more precision. However, when the plaintiff pursued litigation on the matter, she described the break as a depression and a "trap," which caught her toe, causing her to fall. Judgment was entered in favor of the defendant in the trial court, and the Supreme Court affirmed, noting that the City had not been placed on notice of the defect for which plaintiff would be holding the City liable at trial. *Id.*

Ultimately, where a plaintiff's claim is dependent upon compliance with a statute, and the statute's provisions are not satisfied, the claim must fail. *Rowland,* at 205-206, citing *Morgan v McDermott,* 382 Mich 333, 354 (1969). Moreover, this Court made it clear in *Rowland* that the failure to strictly comply with a notice provision is fatal to a plaintiff's claim regardless of whether the City suffered prejudice as a result of the improper notice. Indeed, as demonstrated in *Ells* and *Mauer,* even where the City has actual notice of the incident, that notice does not excuse a plaintiff's failure to strictly comply with the statute requiring pre-suit notice.

D. The Court of Appeals correctly ruled that Plaintiff's purported notice did not provide the exact location of the defect.

Plaintiff's letter of May 26, 2006 states that the location of the accident was "the area of 5034 Middlesex." Plaintiff's appendix at p 33a. Plaintiff's brief also argues that the location of the accident is somehow "between" 5026 Middlesex and 5034 Middlesex, a legal impossibility in a platted subdivision – it is located at either one lot or the other. There is no land located "between" the two lots. Further, in clear language that Plaintiff's brief ignores, the police report written on the date of the accident indicates that "Mawri stated that he slipped and fell on the sidewalk in front of 5026 Middlesex." Plaintiff's appendix at p 11a. Likewise, photographs taken at the scene indicate that the accident occurred in front of 5026 Middlesex. Defendant's appendix at pp 36b-39b; 86b-88b.

Plaintiff clearly admitted at his deposition that the accident did not occur in front of his home (5034 Middlesex) as alleged in the notice and Complaint, but rather, "in front of the neighbor's house," at 5026 Middlesex. Defendant's appendix at p 84b. Plaintiff confirmed this fact in response to a series of questions:

Q: [Referring to a photograph] Is that the house at 5034 Middlesex, where you were living at the time of the accident?

A: Yes.

* * *

Q: And where did the accident occur?

A: At Middlesex in front of the neighbor's house.

(Dep p 11; Defendant's appendix at p 84b.)

After identifying his own home in a photograph, Plaintiff was shown numerous photographs depicting his home and the neighboring home. He consistently identified the neighbor's home as the site of the accident:

Q: Okay. So this Photo No. 3, that shows your house on the left and the neighbor's house on the right; Is that fair to say?

A: This is the one – if that's the neighbor's house, this is where was the accident, was over here (indicating) where the sidewalk when, like repaired (indicating).

Q: And that's also shown in Exhibit 2; Is that right?

* * *

A: Yeah.

Q: Okay. This house that's shown, when you pointed out the tree here in Exhibit 2 as being the approximate location where the accident happened on the sidewalk.

A: Yes. Right here. Like, where the tree is and the sidewalk. That's where I fall.

Q: And that location is in front of the neighbor's house that is one house south of your house?

A: Yes.

Q: Do you know the address of any of the neighbor's house?

A: I think it's – I'm not sure. Is it 5026 or. . .

(Dep pp. 11-13; Defendant's appendix at pp 83b-85b.)

Notably, Plaintiff does not even attempt to explain to this Court why Plaintiff's clear testimony should be disregarded, even after the Court of Appeals relied on it in dismissing the case. Plaintiff did not even address this admission in his briefs on appeal to either the Court of Appeals or the Supreme Court, instead clinging to the legally unsound concept that the location was "between the addresses of 5026 and 5034 Middlesex." The platted subdivision in this case has 40-foot lots, and like other platted subdivisions, contains property lines; it is impossible for a location to be "between" two addresses, and Plaintiff does not provide support for his argument to the contrary.

After giving this damaging testimony,[9] Plaintiff contradicted his testimony in an affidavit attached to his response to Defendant's Motion for Summary Disposition. Plaintiff stated:

> 3. I testified in my deposition that the location of the sidewalk where I fell was in front of my neighbor's home whose address is 5026 Middlesex and I testified that I fell on the sidewalk near where a tree is located.
>
> 4. The exact location where I fell is between 5034 and 5026 Middlesex which is between the house where I was living at the time and my neighbor's house.
>
> 5. Either 5026 or 5024 Middlesex in my understanding would be an accurate numerical address for the location of my fall.

[9] As the Court of Appeals noted in the present case, "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition . . . ." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257 (1993). Slip op at p 3.

6. A better reference of the location where I fell is the tree which was near the sidewalk as it is a good identifier in the photographs and stood alone in the actual area itself.

7. This tree is located between the addresses of 5034 and 5026 Middlesex.

Plaintiff's appendix at p 54a.

Plaintiff also offered in response to Defendant's Motion for Summary Disposition an affidavit signed by Plaintiff's expert, Steven Ziemba, in which Ziemba recants his earlier assertion that the defective sidewalk was in front of 5034 Middlesex, then asserts that the defective sidewalk is between the two addresses. He also pointed to the location of the tree:

9. A better indicator for clarifying the specific location is the tree which is referenced in my report and can be clearly identified in the photographs.

10. This tree is near the incident site and located between the addresses of 5034 and 5026 Middlesex.

Plaintiff's appendix at p 48a-49a.

Plaintiff further tries to confuse the issues by pointing to sidewalk repairs made by the City at 5034 Middlesex, which was not the accident site. Plaintiff cites a City record of a sidewalk repair made at 5034 Middlesex (Plaintiff's appendix at p 16a). However, that was <u>not</u> the site of Plaintiff's accident – according to Plaintiff's own testimony it was located in front of the neighbor's home at 5026 Middlesex. Thus, Plaintiff relies on sidewalk repairs made at 5034 Middlesex, which is not the site of Plaintiff's accident. Simply put, the condition of the sidewalk at 5034 Middlesex is irrelevant because the accident did not occur there.

Plaintiff is correct in one regard -- the tree adjacent to the accident site is an excellent point of reference, as its location proves that the incident occurred in front of 5026 Middlesex, and that Plaintiff's notice did not state the exact location of the incident. Plaintiff's own photographs demonstrate that there was in fact a tree adjacent to the sidewalk in question. When Defendant received Plaintiff's Affidavit contradicting his deposition testimony, Defendant's City Engineer used aerial photographs and physical measurements to determine the exact location of the tree to which Plaintiff referred. Those measurements demonstrated beyond any doubt that the tree was located in front of 5026 Middlesex, a full 15 feet away from the property line that separates the two lots. As clearly demonstrated by the map attached to the City Engineer's affidavit, there is no tree located on the property line and no tree located "between" the two houses. Defendant's appendix at p 72b. In a platted subdivision, it is impossible for the accident to occur "between" two addresses, as Plaintiff contends and the trial court accepted without further comment.

Taken together, Plaintiff's original assertions in his deposition, combined with the police report, photos taken the day of the incident, and a survey done by the City Engineer, all make it clear that the accident occurred in front of 5026 Middlesex, not 5034 Middlesex. Thus, as to the issue of location, Plaintiff's purported notice is defective in two ways. First and foremost, Plaintiff's notice failed to provide the exact location of the defect, in violation of the statute. A notice cannot give an exact location if it gives a wrong location. Second, by initiating this lawsuit with regard to the 5034 Middlesex address, but then pursuing the claim based on allegations related to

5026 Middlesex, Plaintiff is pursuing a theory of liability entirely different from the theory indicated in the notice and Complaint received by the City.

The statute and *Rowland* both require that the plaintiff provide the **exact** location of the defect. Plaintiff's letter merely states that the accident occurred "in the area of 5034 Middlesex." The letter never mentions the exact location of the accident. Plaintiff even admitted that the accident occurred not in the location for which the City was on notice, but instead in front of his neighbor's house. Even if Defendant had actual notice[10] of the incident, or persons present investigating the accident, this is immaterial, as explained in *Ells* and *Mauer.* Thus, the fact that City workers surveyed the area and police officers were called to the scene of the accident and took photographs does not excuse Plaintiff from the requirement that he provide proper pre-suit notice. The Court of Appeals agreed that the address provided in the notice was insufficient under the statute. *Mawri,* at 5. Likewise, the Court of Appeals correctly concluded that the police report did not constitute notice. *Id.* Therefore, the Court of Appeals correctly reversed the trial court and properly ordered summary disposition be granted for Dearborn.

E. The Court of Appeals correctly ruled that Plaintiff's purported notice failed to provide the exact nature of the defect.

Plaintiff's notice also must provide the **exact** nature of the alleged defect, but Plaintiff's letter failed to do so in the instant case. Plaintiff's cover letter refers to a

[10] Plaintiff confuses the knowledge requirement of MCL 691.1403 with the notice requirements of MCL 691.1404. The former provides that a municipality is not liable for a highway defect unless it knew or should have known of the defect, and knowledge and time to repair are conclusively presumed when the defect existed to be readily apparent to an ordinarily observant person for 30 days or more. In contrast, the latter provision pertains to a separate notice requirement, namely a detailed notice served within 120 days as a condition of recovery. Plaintiff's claim that his purported satisfaction of the knowledge requirement should also satisfy the required notice requirement would render the required notice provision meaningless.

"defective side-walk." Plaintiff's appendix at p 33a. No information is provided as to why the sidewalk is defective. As discussed previously, Plaintiff's vague description provides no detail or exactness about what was wrong with the sidewalk – whether it was raised, cracked, worn, crumbling, contained holes, or as the Court of Appeals noted, had a missing slab or protruding pipe. Because Plaintiff acknowledged in the letter that the alleged defect had since been repaired, his description became even more important, as Plaintiff's delay in providing notice prevented the City from investigating the claim before the site of the incident was altered. However, Plaintiff offers nothing more than a mere conclusory allegation that the sidewalk is "defective." A person reading the notice cannot discern *why* the sidewalk is defective and is left to speculate. Thus, as in *Rowland,* the description is not **exact**, and, as in *Rottschafer,* Plaintiff did not articulate a theory of liability in his notice. *Ells* and *Mauer* instruct that this deficiency cannot be overlooked even where a police report had been prepared and city employees had taken photographs of the site.

Ultimately, because both the statute and *Rowland* emphasize that the description of the nature of the defect must be **exact**, Plaintiff's notice is insufficient. Plaintiff's failure to satisfy even one of the requirements is enough to cause his notice to be defective as a matter of law. As Chief Justice Kelly noted,

> Plaintiff's failure to meet one of the four statutory requirements **cannot be excused.**

Rowland, Kelly, J. concurring, at 250 (emphasis added).

Here, Plaintiff failed to satisfy two parts of the notice requirement due to his failure to provide the **exact** location and the **exact** nature of the alleged defect. The Court of Appeals agreed that the address was insufficient, that the police report did not

provide Defendant with notice, and that the mere description of the sidewalk as "defective" did not put Defendant on notice as to the nature of the alleged defect. Consequently, the Court of Appeals correctly reversed the trial court and ordered summary disposition to be entered for Defendant.

II. PLAINTIFF'S CLAIM IS BARRED BY THE TWO-INCH RULE.

Though neither the trial court nor the Court of Appeals ruled on the issue, summary disposition for Defendant is also supported in this case because Dearborn is entitled to governmental immunity under the "two-inch" rule of MCL 691.1402a.

To prevail, Plaintiff must show that his claim falls within an exception to governmental immunity. Plaintiff asserts that the highway exception to governmental immunity applies. Under the highway exception, the City's duty is to maintain the sidewalk in reasonable repair so that it is safe and convenient for public travel. MCL 691.1402. The City does not have a duty to keep the sidewalk "reasonably safe." *Weakley v City of Dearborn Heights*, 246 Mich App 322, 327 (2001). Under the "two inch" rule, a sidewalk defect of less than two inches creates a rebuttable inference that the City maintained the sidewalk in reasonable repair. MCL 691.1402a(2). Where the defect is less than two inches, the plaintiff must provide a factual basis for concluding that the inference does not apply under the circumstances. *Gutierrez v City of Saginaw,* unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket No. 272619), p 2.[11]

In *Griffin v City of Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2006 (Docket No. 269988), the Michigan Court of

[11]The unpublished decisions of the Court of Appeals have been omitted from Defendant's appendix in the interest of brevity. The copies appear in the briefs filed in the lower courts.

Appeals granted summary disposition in favor of the City of Pontiac on the basis of the two-inch rule. There, the plaintiff tripped and fell on a sidewalk, which she alleged was improperly maintained. In response to Pontiac's two-inch rule defense, the plaintiff submitted photographs showing voids and defects in the sidewalk that were greater than two inches in surface area, but which clearly demonstrated that the height differential was less than two inches. Moreover, the plaintiff did not explain how the depicted surface defects caused the sidewalk to be unsafe or inconvenient for public travel. *Id*, at 2. Consequently, the Court held that the plaintiff had not rebutted the presumption that the City kept the sidewalk in reasonable repair.

The Court of Appeals elaborated upon the "safe and convenient for travel" standard of "reasonable repair" in *Horowitz v Southfield*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 272902), p 1. There, the measurements of the sidewalk defect were unclear, but the plaintiff alleged that she fell when her foot got caught on "a very deep crevice . . . enough to catch my toe and slam me down." *Id.* Even when assuming many facts in the plaintiff's favor, the Court held that the City was entitled to summary judgment, reasoning,

> An imperfection in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not 'reasonably safe and convenient for public travel,' and the government agency is on notice of that fact.' *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006). Even if one assumed that the photographs taken several months after plaintiff's fall accurately depicted the condition of the sidewalk at the time of her fall, and that defendant had actual or constructive notice of that condition, reasonable jurors could not conclude that the condition as depicted rendered the sidewalk not 'reasonably safe and convenient for public travel.'

Id., at 3. Thus, even the existence of a "very deep crevice" does not make a sidewalk unsafe or inconvenient for travel, and cannot rebut the statutory inference of reasonable repair.

The cases consistently conclude that a plaintiff cannot recover damages based on the existence of a defect alone. In *Jones v Flint*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2005 (Docket No. 263036), the Court of Appeals held that a plaintiff did not rebut the statutory inference of reasonable repair where the plaintiff offered photographs and a report by a safety engineer indicating that the sidewalk was not reasonably safe. *Id,* at 3. Such "conclusionary statements," unsupported by specific facts did not provide sufficient support for the plaintiff's claim. *Id.* The Court noted, "at the least, some analysis of why a lesser discontinuity is unusually or specifically dangerous is required so as not to render the inference essentially useless." *Id.*

Even where the plaintiff does provide more than conclusionary statements, certain kinds of facts are not sufficient to rebut the presumption of reasonable repair. For example, evidence related to "average walking patterns, the progress of underground roots, or nighttime darkness," is insufficient to support a claim that a sidewalk is unsafe. *Gutierrez*, at 2. Additionally, where a city's engineer was aware of a height differential and thought it should be repaired under a city policy imposing a stricter standard for when repairs should be made than is imposed by the two-inch rule, the engineer's opinion was not enough to rebut the presumption of reasonable repair for purposes of the two-inch rule. *Ledbetter v City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2006 (Docket No.

269758), p 2; *Allgaier v City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2006 (Docket No. 268102), p 2-3. Moreover, where a plaintiff alleged inadequate inspection of a damaged sidewalk, the lack of inspections did not rebut the presumption of reasonable repair where a village was otherwise unaware of the potential trip hazard. *Bates v Village of Addison*, unpublished opinion of the Court of Appeals, issued October 4, 2005 (Docket No. 253374), p 2. Even where a defendant was on notice of an alleged defect, the notice did not defeat the City's two-inch rule defense where the plaintiff failed to rebut the presumption of reasonable repair. *Gutierrez*, at 2-3. Furthermore, where a municipality is "placed on notice of the discontinuity pursuant to an inspection policy, no repair [is] required[,] as the sidewalk is in 'reasonable repair.'" *Id.*

In *Baine v City of Inkster*, unpublished opinion of the Court of Appeals, issued April 26, 2007 (Docket No. 274261), the plaintiff tripped on a sidewalk that was less than two inches, as shown by the defendant's photographs, and the plaintiff's photograph did not provide a contradictory measurement. *Id* at 1. In view of this evidence, the Court of Appeals stated:

> If the inference of reasonable repair created by MCL 691.1402a(2) is to have any meaning, then a plaintiff relying on a discontinuity defect of less than two inches needs to establish some aspect of the defect that distinguishes it from the typical cases to which the inference was intended to apply. In this case, the hazard posed by the raised flag was apparent and could have been avoided by pedestrians. Plaintiff failed to present any evidence to rebut the inference of reasonable repair.

Id at 2.

The present case is closely akin to *Griffin* and *Baine*. Neither the photographs taken on the evening of the incident, nor the photographs taken by Plaintiff provide any

basis for rebutting the inference of reasonable repair. Plaintiff's own photographs illustrate only a minor height differential in one corner of the sidewalk flags. Plaintiff's appendix at p 12a. Neither Plaintiff's photographs nor any other evidence in the record provide grounds for concluding otherwise. Therefore, the two-inch rule applies, and it is presumed that the City maintained the sidewalk in reasonable repair.

Because the measurements in this case are not clearly defined, this case also resembles *Horowitz.* As in *Horowitz,* the photographs not only fail to provide measurements, but they also fail to provide any other basis upon which the jury could conclude that the sidewalk was not in reasonable repair. All that is alleged is a "defective sidewalk," and all that is depicted in the photograph is a slight height differential between the flags. The alleged defect is not a crack, nor a crevice, nor a depression. It is exactly the type of situation intended to be covered by the two-inch rule. Therefore, as in *Horowitz, Griffin,* and *Baine*, Plaintiff cannot rebut the statutory inference of reasonable repair, and summary disposition should be granted for Defendant, City of Dearborn.

Plaintiff also offers the statements of a safety engineer, Steven Ziemba, but the engineer's report and Affidavit do not support Plaintiff's claim. First and foremost, Ziemba's original report relates to the condition of the sidewalk in front of the *wrong* address (5034 Middlesex), and even the purported "correction" that he makes in his Affidavit is still wrong: he identifies the location of the sidewalk as being *between* the two addresses, when it actually was in front of 5026 Middlesex. Even if Ziemba's assertions were to be considered as evidence, they are nothing more than vague, conclusionary statements. He states that the sidewalk "was in a defective and/or

unreasonably dangerous condition," that there was a "significant trip hazard" and that the City has "a duty and obligation . . . to maintain and repair the public sidewalks." Plaintiff's appendix at p 40a-41a. However, *Jones* provides that mere conclusionary statements by an expert, such as those made by Mr. Ziemba, are insufficient to rebut the presumption of reasonable repair. Additionally, as noted in *Gutierrez,* it is not enough that Ziemba opined that there might have been "problems associated with trees." Ziemba offers little else in his subsequent Affidavit, and again, under *Jones,* his bald assertions that the height differential was "more than 2 inches" and that there was a "defect in the sidewalk" are unavailing.

Thus, in this case, Plaintiff offers nothing other than conclusory statements and general references to a minor imperfection in the sidewalk, neither of which provides the specific factual basis required under *Gutierrez* to show why the statutory inference of reasonable repair should be rebutted under the circumstances. Moreover, Plaintiff cannot merely claim that the City failed to keep the sidewalk safe, as the City has no duty to keep the sidewalk safe, per *Weakley.* The sidewalk was in reasonable repair, and thus the trial court should have concluded that Plaintiff's claim was barred by the two-inch rule.

III. PLAINTIFF'S CLAIM IS BARRED BY THE NATURAL ACCUMULATION DOCTRINE.

Summary disposition for Defendant is also supported by the natural accumulation doctrine.

"It has long been the law in this state . . . that a governmental agency's failure to remove the natural accumulations of ice and snow on a public highway does not signal negligence of that public authority." *Haliw v Sterling Heights,* 464 Mich 297,

305 (2001). Under the natural accumulation doctrine, a city's "failure to remove ice or snow from a highway does not, by itself, constitute negligence." *Id.,* at 308. Rather, "there must be a 'persistent defect' in the sidewalk that renders it 'unsafe for public travel at all times, and which combines with the natural accumulation of ice or snow to proximately cause the injury.'" *Burton v Waterford Township,* unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007, p. 2, citing *Haliw* at 312.

In *Haliw,* the plaintiff slipped on ice that had accumulated in a depression where two sidewalk flags met. It had been snowing that day, and the sidewalk had not yet been shoveled. Notably, the plaintiff admitted in her deposition that she did not trip on the sidewalk itself, but rather had slipped on an ice patch. *Id.,* at 299, note 2. Plaintiff hired an engineering expert who concluded that a depression existed at the point where the two sidewalk slabs met, and that this depression allowed water to accumulate and ultimately freeze in cold weather. *Id.,* at 300. However, the expert also asserted that the sidewalk would otherwise be safe in normal weather conditions. *Id.* This Court ultimately concluded that the plaintiff could not demonstrate "that it was the *combination* of ice *and* a defect in the sidewalk that caused her to slip and fall." *Id.,* at 310. This Court also emphasized the facts that the plaintiff admitted she fell on ice, and that there was no evidence of a persistent defect. *Id.* Thus, this Court concluded that the ice was the "sole proximate cause" of the plaintiff's injury. *Id.* Under the natural accumulation doctrine, the ice alone did not support plaintiff's claim for recovery, and consequently plaintiff's claim failed. *Id.* at 311.

The same result occurred in *Burton v Waterford Township*, unpublished opinion per curiam of the court of Appeals, issued April 26, 2007 (Docket No. 274332). In *Burton* the plaintiff was injured after losing control of his bicycle when its tires slipped on an accumulation of mud or algae underneath a puddle of water on a sidewalk. *Burton,* at 1. The Court of Appeals applied the natural accumulation doctrine as expressed in *Haliw. Burton,* at 1-2. The Court emphasized that, under *Haliw,* it is not enough for a plaintiff to show that there was "an accumulated substance on the sidewalk, even if that accumulation was itself occasioned by a depression in the sidewalk." *Haliw,* at 2. In *Burton,* the plaintiff only alleged that the mud and water caused his injury; there was no evidence of an underlying defect. Consequently, because there was no "persistent defect," the Court followed *Haliw* and ordered that judgment be entered in favor of the defendant.

The natural accumulation doctrine likewise applies to the case at bar. Here, Plaintiff admitted on the day of the accident that he slipped and fell "because the sidewalk was covered with ice." Plaintiff's appendix at p 11a. Significantly, Plaintiff cannot prove a "persistent defect." While Plaintiff procured the opinion of an engineering expert, the expert's opinions related to the sidewalk in front of 5034 Middlesex, which is the wrong location. Plaintiff's appendix at 40a. Even the expert's Affidavit, which purportedly corrects the report, fails to identify the correct location of the sidewalk flag. Plaintiff's appendix at p 48a ("[e]ither [address] ... would be correct to identify the location of the incident..."). Plaintiff provides no evidence of a persistent defect at 5026 Middlesex, the actual location of the incident. Consequently, this case is no different from *Haliw* or *Burton.* Plaintiff admitted that

he slipped on ice that naturally accumulated on the ground, and has not demonstrated that his injury resulted from a combination of ice accumulation and a sidewalk defect. Plaintiff does not meet the standard set out in *Haliw; the* trial court could have relied on that basis in granting Defendant's Motion for Summary Disposition, rather then denying it.

CONCLUSION

For the reasons stated above, the Court of Appeals correctly reversed the trial court and acted correctly in remanding the case for entry of an order granting summary disposition for Defendant. Defendant, City of Dearborn, respectfully requests that this Court affirm the ruling of the Court of Appeals.

In the alternative, in the event that the Court rules for Plaintiff on the *Rowland* issue, Defendant requests a remand to the trial court or Court of Appeals for a ruling on the other issues raised in the original Motion for Summary Disposition.

Respectfully submitted,

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